

In the Supreme Court of the State of Idaho

IN RE: AMENDMENT OF IDAHO)	
CRIMINAL RULES (I.C.R.) 32(h)(1), 35(c))	ORDER AMENDING
and 41(c) and ADOPTION OF NEW)	RULES
RULES 18.1 and 43.3)	

The Court having reviewed the recommendations approved by the Criminal Rules Advisory Committee and an *ad hoc* Committee on Criminal Mediation to amend Idaho Criminal Rules, and the Court having fully considered the same;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Idaho Criminal Rules as they appear in the volume published by the Idaho Code Commission be, and they are hereby, amended as follows:

1. That a **NEW** Rule 18.1 be, and the same is hereby, adopted to read as follows:

Rule 18.1. Mediation in criminal cases.

In any criminal proceeding, any party or the court may initiate a request for the parties to participate in mediation to resolve some or all of the issues presented in the case. Participation in mediation is voluntary and will take place only upon agreement of all parties. Decision making authority remains with the parties and not the mediator.

(1) **Definition of "Mediation".** Mediation under this rule is the process by which a neutral mediator assists the parties (defined as the prosecuting attorney on behalf of the State and the Defendant) in reaching a mutually acceptable agreement as to issues in the case, which may include sentencing options, restitution awards, admissibility of evidence and any other issues which will facilitate the resolution of the case. Unless otherwise ordered, mediation shall not stay any other proceeding.

(2) **Matters Subject to Mediation.** All misdemeanor and felony cases shall be subject to mediation if the court deems that it may be beneficial in resolving the case entirely. Issues related, but not limited to, the possibility of reduced charges, agreements about sentencing recommendations or possible Rule 11 agreements, the handling of restitution and continuing relationship with any victim, are all matters which may be referred to mediation.

(3) **Selection of Mediator.** The court shall select a mediator from those maintained on a roster provided by the Administrative Office of the Courts, after

considering the recommendations of the parties. That roster will include senior or sitting judges or justices who have indicated a willingness to conduct criminal mediations and who have completed a minimum of twelve (12) hours of criminal mediation training within the previous two years before being placed on the roster. If the selected mediator is a senior judge or justice, the mediator will be compensated as with any senior judge service, and approval from the trial court administrator must be obtained by the court prior to the mediation.

(4) **Role of the Mediator.** The role of the mediator shall be limited to facilitating a voluntary settlement between parties in criminal cases. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, exploring options and discussing areas of agreement which can expedite the trial or resolution of the case. The mediator shall not preside over any aspect of the case, other than facilitation of a voluntary settlement according to this rule. The mediator shall not take a guilty plea from nor sentence any defendant in the case.

(5) **Persons to be Present at Mediation.** Participants shall be determined by the attorneys and the mediator.

(6) **Confidentiality.** This section should be read in conjunction with the provisions of I.R.E. 507. Mediation proceedings shall in all respects be privileged and not reported or recorded. No statement made by any participant at the mediation shall be admissible at trial of any defendant in the case or be considered for any purpose in the sentencing of any defendant in the case. No statement made by a defendant in the course of mediation shall be reported to the prosecuting attorney without the consent of the defendant. Any written statements submitted to the mediator by either party as a part of the mediation process shall remain confidential and shall not be disclosed by the mediator to anyone. Any confidential statements or notes taken by the mediator shall all be destroyed at the conclusion of the mediation. The mediator shall not discuss any matter that comes up within the mediation with anyone other than the parties and defense counsel and shall advise the assigned court only as to whether the mediation was successful and, if so, the agreed upon terms.

(7) **Mediator Privilege.** Consistent with I.R.E. 507, a mediator may not be compelled to provide evidence of a mediation communication under this rule. However, in Uniform Post-Convictions cases where a defendant is raising allegations about the conduct of the prosecutor or defense counsel involved in the mediation, the mediator may agree to waive the privilege.

(8) **Agreements Reached.** Any agreement reached by the parties is subject to approval by the court and is not final until the court agrees to the terms.

(9) **Communications Between Mediator and the Court.** The mediator may consult with the presiding judge about the terms of a possible plea agreement; otherwise, the mediator and the court shall have no contact or communication except that the mediator may, without comment or observation, report to the court:

- (a) that the parties are at an impasse;
- (b) that the parties have reached an agreement. In such case, however, the agreement so reached shall be reduced to writing, signed by the prosecuting attorney, the Defendant and defense counsel, and submitted to the court for approval;

- (c) that meaningful mediation is ongoing;
- (d) that the mediator withdraws from the mediation.

(10) **Communications Between Mediator and Attorneys.** The mediator may communicate in advance of the mediation with the attorneys to become better acquainted with the current state of negotiations and the issues to be resolved in the mediation. This communication may be conducted separately with each of the attorneys and without the presence of the defendant.

(11) **Termination of Mediation.** The court, the mediator, or any party may terminate the mediation at any time if further progress toward a reasonable agreement is unlikely or concerns or issues arise that make mediation no longer appropriate.

2. That Rule 32(h)(1) be, and the same is hereby, amended to read as follows:

Rule 32. Standards and procedures governing presentence investigations and reports.

(h) Disclosure of presentence reports.

(1) Custody of presentence report. Any presentence report shall be available for the purpose of assisting a sentencing court. After use in the sentencing procedure, the presentence report shall be sealed by court order, and thereafter cannot be opened without a court order authorizing release of the report or parts thereof to a specific agency or individual. Provided, the presentence report shall be available to the Idaho Department of Corrections so long as the defendant is committed to or supervised by the Department, and may be retained by the Department for three years after the defendant is discharged. In addition, when preparing a report on a defendant, a presentence investigator shall have access to previous presentence reports, including all attachments and addendums, prepared on that defendant, whether in the same case or in previous cases. The pre-sentence investigator's own copy of the presentence report similarly is restricted from use by all but authorized court personnel. Neither the defendant, defendant's counsel, the prosecuting attorney nor any person authorized by the sentencing court to receive a copy of the presentence report shall release to any other person or agency the report itself or any information contained therein, except as provided in Article 1, Section 22(9) of the Idaho Constitution. Any violation of this rule shall be deemed contempt of court and subject to appropriate sanctions.

3. That Rule 35(c) be, and the same is hereby, amended to read as follows:

Rule 35. Correction or reduction of sentence.

(c) **Credit for time served ~~prior to sentencing~~.** A motion to correct a court's ~~the~~ computation of credit for time served, granted pursuant to Idaho Code Sections 18-309 or 19-2603, ~~prior to sentencing~~ may be made at any time.

4. That Rule 41(c) be, and the same is hereby, amended to read as follows:

Rule 41. Search and seizure.

(c) Issuance and content. A warrant shall issue only on an affidavit or affidavits sworn to before a district judge or magistrate or by testimony under oath and recorded and establishing the grounds for issuing a warrant. If the district judge or magistrate is satisfied that there is probable cause to believe that the grounds for the application exist, the judge or magistrate shall issue a warrant identifying the property or person and naming or describing the person or place to be searched. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis, considering the totality of the circumstances, to believe probable cause exists. Before ruling on a request for a warrant the district judge or magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses affiant may produce, provided that such proceeding shall be taken down by recording equipment and shall be considered a part of the affidavit. The warrant shall be directed to any peace officer authorized to enforce or assist in enforcing any law of the state of Idaho. It shall command the officer to search, within the specified period of time, not to exceed fourteen (14) days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

5. That a **NEW** Rule 43.3 be, and the same is hereby, adopted to read as follows:

Rule 43.3. Forensic Testimony by Video Teleconference.

Forensic testimony may be offered by video teleconference via simultaneous electronic transmission. For testimony via video teleconference to be admissible:

1) The forensic scientist must be visible to the court, defendant, counsel, jury, and others physically present in the courtroom.

a. The court and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.

b. The defendant, counsel from both sides, and the forensic scientist must be able to see and hear each other simultaneously and communicate with each other during the proceeding.

c. A defendant who is represented by counsel must be able to consult privately with defense counsel during the proceeding.

2) The party intending to submit testimony via video teleconference shall give written notice to the court and opposing party twenty eight (28) days in advance of the proceeding date.

3) A party in opposition to testimony being given via video teleconference shall give the court and opposing party written notification of his or her objection or affirmative consent no later than fourteen (14) days prior to the proceeding date.

4) The party seeking to introduce testimony via video teleconference shall be responsible for coordinating the audiovisual feed into the courtroom. Nothing in this rule shall be construed to require court personnel to assist in the preparation or presentation of the testimony provided by the provisions of this rule.

The testimony shall be recorded in the same manner as any other testimony in the proceeding.

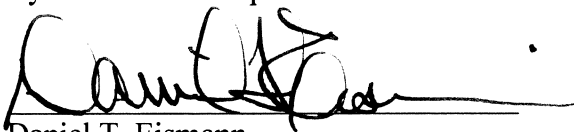
IT IS FURTHER ORDERED, that this order and these amendments shall be effective the first day of July, 2011.

IT IS FURTHER ORDERED, that the above designation of the striking of words from the Rules by lining through them, and the designation of the addition of new portions of the Rules by underlining such new portion is for the purposes of information only as amended, and NO OTHER AMENDMENTS ARE INTENDED. The lining through and underlining shall not be considered a part of the permanent Idaho Criminal Rules.

IT IS FURTHER ORDERED, that the Clerk of the Court shall cause notice of this Order to be published in one issue of *The Advocate*.

DATED this 18 day of March, 2011.

By Order of the Supreme Court



Daniel T. Eismann
Chief Justice

ATTEST:

Stephen Kenyon
Clerk

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the order entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 3-21-11

STEPHEN W. KENYON Clerk

By: Kimber Grove Deputy